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(Keep covers of each number on when binding volume. They provide the index.)

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MASSACHUSETTS BAR ASSOCIATION, 60 State St., Boston, Mass.

NOTICE OF U. S. CIVIL SERVICE EXAMINATIONS FOR ATTORNEYS.

The United States Civil Service Commission has announced open competitive examinations as follows:

PRINCIPAL ATTORNEY, $5,600; SENIOR ATTORNEY, $4,600; ATTORNEY, $3,800 a year, Federal Communications Commission. Admission to the bar and certain specified experience required. Age, for Principal Attorney under 60, for Senior Attorney and Attorney under 53. Veterans are exempt from age requirements. Application Form 8. Announcement 54 (Unassembled). Closing date for applications, October 30, 1934.

ASSOCIATE ATTORNEY, $3,200; ASSISTANT ATTORNEY, $2,600; JUNIOR ATTORNEY, $2,000 a year, Federal Communications Commission. Admission to the bar required for all three grades. Certain specified experience required for Associate Attorney and Assistant Attorney. Age, for Associate Attorney under 45, for Assistant Attorney under 40, for Junior Attorney under 35. Application Form 8. Announcement 53 (Assembled). Closing date for applications, October 30, 1934.

Address:

THE MANAGER
First U. S. Civil Service District
U. S. Post Office and Court House Bldg.
BOSTON, MASSACHUSETTS.

ERA AND THE BAR — A REQUEST FOR INFORMATION.

At the request of the ERA headquarters at 49 Federal Street, Boston, the president of the Massachusetts Bar Association has selected a committee to work with the ERA authorities, in suggesting local projects of public service which would give employment to needy lawyers, and in ascertaining what lawyers are in need. The committee consists of

LAWRENCE G. BROOKS, of Medford, *Chairman*
WILLARD B. LUTHER, of Cambridge
GEORGE D. WHITMORE, of Holyoke
MOSES D. FELDMAN, *Secretary*, 11 Beacon St., Boston

to whom information as to individuals and any other suggestions may be sent.

Entered as Second-Class Matter at the Post Office at Boston.

REPORT

OF THE

COMMITTEE ON RULE-MAKING POWER AND JUDICIAL COUNCILS.

(Submitted to the Conference of Bar Association Delegates at Milwaukee, August 27, 1934. The recommendations were approved and it was voted that the report be sent to all Federal judges and presidents of State Bar Associations and others.)

To the Conference of Bar Association Delegates:

I. Co-operation Between the Federal Courts and the Bar.

During the past year, the plan suggested by this committee and explained in its last three reports to bring about co-operation between the bar and the National Conference of Senior Circuit Judges has been actively developed, especially in two federal circuits, the sixth and the fourth.

The plan was suggested to carry out the request for such co-operation expressed by Chief Justice Hughes on behalf of the National Conference of Circuit Judges, and the work in these two circuits illustrates the useful possibilities of the plan when it is more fully developed in other circuits. An account of the proceedings in the Sixth Circuit, comprising the states of Michigan, Tennessee, Kentucky and Ohio, appears in the American Bar Association Journal for February, 1934 (page 103). It illustrates the way in which the plan may be operated in other circuits and also shows the nature of the questions discussed at the conference between the federal judges and the federal bar committees.

Another meeting of the federal judges in that circuit and of the bar committees has been called by Judge Moorman, of the Circuit Court of Appeals for June 29, 1934, and we understand that all the judges of the Court of Appeals will be present and that the district judges throughout the circuit have been invited. The conference plans to consider matters left open at the last conference, which are described in the report above referred to, and also such additional suggestions as may be received—all of which are manifolded and sent to all in advance of the meeting.

In the fourth circuit a similar meeting was held in June, 1933, and we are informed by Judge Parker of the Circuit Court of Appeals that another meeting is to be held this month at which Chief Justice Hughes is expected to be present to join in the Conference.

We recommend the study of these proceedings to the bench and bar of the other circuits of the country.

As a striking contrast, we call attention to the different attitude in another federal circuit in which we are advised that when the plan of a conference between the bar committees and the federal judges was suggested, the representatives of the bar "were given to understand in very direct language that the senior judge would represent the circuit and that he did not care for any advice from any bar association." We respectfully suggest that the time for that sort of attitude on the part of the bench is past and that the senior circuit judges should learn to take part in the plan of co-operation which the National Conference, of which they are members, not only sanctioned, but invited.

THE INCREASING NEED OF CO-OPERATION BETWEEN THE FEDERAL BENCH AND BAR.

Since the first draft of this report was prepared Congress has passed an act authorizing the Supreme Court to prescribe rules of procedure in actions at law. A copy of this act appears in a footnote.* This act together with the recent act authorizing rules for criminal cases after verdict and the earlier rule-making power in equity cases brings almost the whole *procedure* of the federal courts within the rule-making power. The National Conference of Circuit Judges has also recommended from time to time the extension of their functions to include direct recommendations to Congress. This extension of the rule-making power of the Supreme Court of the United States adds greatly to the importance of developing the plan of co-operation between the federal bench and bar in all the circuits of the country in

* The text of the measure (S. 3040) authorizing the Supreme Court to prescribe and publish rules to govern actions at law, as agreed to by both Houses of Congress, follows:

"*Be it enacted, etc.,* That the Supreme Court of the United States shall have the power to prescribe by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect 6 months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

"Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure our form of civil action and procedure for both: *Provided, however,* That in such union or rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

order to bring the judgment and experience of the bar into play in connection with the formulation of rules and their possible revision from time to time. As we stated in the first report of this committee on this subject in September, 1931:

> "Many judges, however able and experienced, have been removed for a long time from the problems of practice which the bar has to meet every day in the interests of the clients for the settlement of whose disputes the courts exist. The attorney general's department, however able and efficient, necessarily represents the government point of view. The point of view of the men who represent the clients of the nation should be given expression by some method."

It was to provide such a method that the plan of co-operating committees already described was suggested by this committee and approved by the Conference and by the American Bar Association. If the examples of the sixth and the fourth circuits are followed in others, the profession will be better prepared to assist the federal courts in meeting their new responsibilities.

II. Judicial Councils.

Some wise man said, "All general statements are untrue. This is one of them." Professor Sunderland is sufficiently wise and well-informed to make fewer untrue generalizations than most of us. In the Journal of the American Judicature Society for June, 1934 (p. 19), he is quoted as follows:

> The judicial council is the only organization ever created by law for the purpose of giving the general public a powerful, responsible and competent representative in securing the establishment and maintenance of a fair and effective administration of justice.

The movement for the creation of judicial councils, for the continuous study of the judicial system of the states and of the procedure and practice and their results, continues to spread throughout the country. At the date of our last report, such councils had been created in about fifteen states.

During the past year, following the report of the special Commission on the Administration of Justice and upon its recommendation, a judicial council was created by the legislature for the State of New York. A separate commission was also created for the study of rules of substantive law.

In this connection, it is interesting to note that in January of this year the Lord Chancellor created a *standing* committee in England with the Master of the Rolls as Chairman "To consider how far, having regard to the statute law and to judicial decisions such legal maxims and doctrines as the Lord Chancellor may from time to time refer to them, require revision in modern conditions." This committee consists of five justices and a number of barristers.

A judicial council has been created in West Virginia and in Indiana, steps are being taken by the State Bar Association for the organization of one.

The Judicial Council of South Dakota, created in 1933, has organized its work on an active basis.

In Arizona, at the invitation of the recently organized state Bar under the act of 1933, the judges of the Supreme and other courts formed a council and co-operating committees of the state bar were appointed.

In Oklahoma, in January, 1934, the Board of Governors of the state bar entered an order subject to approval of the Supreme Court establishing a permanent committee to be known and designated as "The Judicial Council Oklahoma." This order was approved and the council thus created has been devoting its efforts to the study of methods for clearing the seriously congested dockets in that state.

In Illinois, the "Judicial Advisory Council," consisting of five senators, five members of the lower house and five members appointed by the governor, which was active prior to the death of Senator Cuthbertson, appears to have temporarily subsided. We understand that the governor of that state has not appointed the five members of the bar at large although the president of the state bar association has repeatedly requested such an appointment.

The judicial councils in most other states where they exist have continued their activities and their annual reports are attracting increasing attention in different parts of the country.

III. Rule-Making Power.

We closed our last report with the following paragraphs, which we repeat in view of the fact that they appear to have met with an interested response from the profession:

> The powers involved are sometimes referred to as "inherent" powers of the courts and we have heard the word "inherent" objected to by some lawyers. We think the conception of the powers, or more exactly the duties, of courts in this connection may be more clearly understood if, instead of using the word "inherent" we consider the powers involved as merely incidental to the duties as a matter of common sense administration of the judicial business of the state, and that the reasonable regulation of how the business of courts is to be done is as natural a part of the judicial function, with the co-operation of the bar, as the actual decision of cases.
>
> In these days when every variety of bureau or department is being created in this country with almost unlimited power of regulation, it would be strange if a closer study of the nature of the great judicial department in our system of government did not result in recognition of regulatory powers adequate to the proper performance of the great duties imposed upon it—duties which the American people expect the courts and not the legislatures to perform.

We also quote them as we feel that they state perhaps as well as we are able to state them; briefly, our suggestions to the bench and bar of the country on this subject.

The movement in the direction of broader recognition and exercise of the administrative rule-making powers of the courts has developed during the past year so that it is rapidly becoming one of the major movements in the profession.

The recent report of the Missouri Commission, appointed by the Supreme Court of that state and printed in the Missouri Bar Journal for May, 1934, the address of President Guinther of the Ohio State Bar Association in June, 1933, the vigorous action of the Supreme Court of Oklahoma with the support of the bar and of the public during the year, the comparatively recent advisory opinion of the Justices of the Supreme Judicial Court of Massachusetts and the similar opinions of the Supreme Court of Missouri, Illinois and other courts on the constitutional judicial functions and the statutes in Wisconsin and elsewhere specifically recognizing procedural statutes as rules of court subject to revision by the court, have focused attention upon the ideas which we have expressed in our reports as to the functions of courts which are incidental to their duties.

In his address to the Ohio State Bar Association in January, 1934, which was reprinted in the American Bar Association Journal for April, Judge Atwood, of the Supreme Court of Missouri, said:

> That courts have judicial powers which now lie unused or undeveloped is suggested by the fact that for the first half of our national history the judicial branch of government carried full responsibility for the administration of justice. The bench and bar were not then so constituted as to be responsive to needed reforms and legislatures sometimes acted in matters strictly judicial because there was no other organ for the expression of the popular will. If it so happens that now the attitude is reversed and legislatures are generally unresponsive to reform needs it is but natural that people should turn to the courts. In this situation it will scarcely be said that a constitutional court of competent jurisdiction should omit or stay performance of any of its judicial functions because of prior legislative encroachment or until the passage of a legislative act "conferring" any judicial power that it possessed. By the mere encroachment of one or the neglect of another neither branch of government can gain or lose power in contravention of the constitutional separation of powers. Assuming the existence of such a constitutional provision, powers belonging to one branch cannot be legislatively conferred upon another. The solution lies in a proper determination of the limits of legislative and judicial power. However lightly some may regard the constitutional separation and distribution of governmental powers, it is still the pattern of our fundamental law. Whenever a better form of government for our people is devised we will doubtless adopt it, but until such is lawfully done it is neither honest nor safe to scramble or destroy the pattern.

The point has been expressed most concisely by Chief Justice Riley of the Supreme Court of Oklahoma in his address to the American Judicature Society in Washington in May of this year. In describing his conception of the independent functions of the judiciary under our American Constitutions in the absence of specific restrictions, he adapted Senator Sherman's * famous remark in regard to the resumption of specie payments after the Civil War and stated that, as the courts were charged by the constitution with the administration of justice, "The way to administer is to administer."

The struggle in Oklahoma which has resulted in the activity described at the American Judicature Society meeting and in the AMERICAN BAR ASSOCIATION JOURNAL is a struggle for an independent judiciary in the youngest state of the Union similar to the struggle which took place in the formative days of the nation, as was demonstrated by Mr. Philip Kates of the Oklahoma Bar at the Judicature Society meeting.† At that meeting, a committee was appointed to present to the Executive Committee of the American Bar Association, as a part of its program of activities during the coming year, the subject of a broader realization by the courts of their constitutional administrative functions. In this connection, we suggest to the bar in the older states, reflection on the brief statement above quoted from Chief Justice Riley of the youngest state.

FRANK W. GRINNELL, *Chairman*, Boston,
JOHN D. BLACK, Chicago,
MURRAY SEASONGOOD, Cincinnati,
PALMER HUTCHESON, Houston,
LAURENT K. VARNUM, Grand Rapids,
THOMAS PENNEY, JR., Buffalo.

SUPPLEMENTARY NOTE.

While this report was in the press the Supreme Court of Wisconsin on June 26 adopted important rules recommended by the Wisconsin Advisory Committee on Procedure. These rules changed certain statutory provisions as to civil and criminal procedure in accordance with the legislative provision that legislative regulations should be regarded merely as rules of court subject to change by the court.

On June 27 the Supreme Judicial Court of Massachusetts adopted new rules raising the standards of admission to the bar.

* For discussion as to whether Sherman, Horace Greeley or Salmon P. Chase "originated" the statement see A. B. A. Journal for April, 1934, p. 252 and June, 1934, p. 382. Probably they all used it. After all it is a simple idea.—F. W. G.

† See Journal of American Judicature Society for June, 1934, pp. 8-15.

QUESTIONS SUBMITTED TO THE JUSTICES OF THE SUPREME JUDICIAL COURT FOR ADVISORY OPINIONS.

1. AS TO UNLAWFUL PRACTICE OF LAW.

The so-called "bar" bill, which has been before the legislature in substantially the same form for several years and the provisions of which, with their history and the reasons for Governor Ely's veto in 1933, were printed in the *Massachusetts Law Quarterly* for August, 1933, page 22, passed the House again this year. While it was pending in the Senate, as a result of vigorous action by a committee of the Middlesex Bar Association, constitutional questions as to the legislation were raised by Senator Warren. As a result, the bill was referred to the next legislature and the following order was adopted by the Senate:

ORDER ADOPTED.

WHEREAS, There is pending before the Senate a bill entitled "An Act relative to the unauthorized practice of law and prohibiting certain acts and practices" printed as House document numbered fourteen hundred and thirty-three, a copy whereof is hereto annexed; and

WHEREAS, Doubt exists as to whether certain provisions of said bill do not invade the judicial province in violation of Article XXX of Part the First of the Constitution of the Commonwealth or otherwise violate the provisions of the Constitution; therefore be it

Ordered, That the opinions of the Honorable the Justices of the Supreme Judicial Court be required by the Senate on the following important questions of law:

1. In so far as the words "practice of law" relate to the performance of the functions of an attorney or counsellor at law before the courts, is it constitutionally competent for the General Court to enact legislation forbidding or permitting such practice by corporations or associations or by individuals other than members of the bar of the Commonwealth?

2. In so far as said words relate to the performance of the customary functions of an attorney or counsellor at law which do not involve appearance before the courts, is it constitutionally competent for the General Court to enact legislation forbidding or permitting such practice by corporations or associations or by individuals other than members of the bar of the Commonwealth?

3. To what extent are the forbidding or permitting of the exercise of the rights and privileges set forth in questions one and two and their regulation judicial rather than legislative functions?

4. Is there any phase of the practice of law set forth in said pending bill to which or from which the General Court may by legislation admit or debar corporations or associations or individuals who are non-members of the bar of this Commonwealth?

5. Is it constitutionally competent for the General Court, in the form of exceptions to general provisions making it unlawful for corporations or associations to practice law in this Commonwealth, to grant special powers and privileges to various corporations and associations, substantially as set forth in sections one and two of said bill?

Answers to the foregoing questions are respectfully sought by the Senate for its guidance at the next annual session of the General Court, to which it is proposed to refer said pending bill.

Subsequently, Mr. Stevens, for the said committee, reported that the order ought to be adopted; and it was considered forthwith, under a suspension of the rule, moved by Mr. Stevens, and was adopted.

The peculiarity of the bill House 1433, thus referred to, was that in its first section it prohibited in broad language the practice of law by laymen and corporations, and in the second section it exempted more different kinds of corporations, associations and agencies than are mentioned in the present Section 47 of Chapter 221 of the General Laws. The statute, therefore, seemed likely to increase, rather than diminish, the present confusion of thought in regard to this subject. The opinions of the justices will doubtless help to clarify the situation.

F. W. G.

2. INTERSTATE COMPACTS AS TO CONDITIONS OF EMPLOYMENT INCLUDING MINIMUM WAGE PROVISIONS.

The following order, offered by Senator Parkman and adopted by the Senate on June 29, may be of interest to the Bar.

ORDER ADOPTED.

Mr. Parkman offered the following order, and, under the rule, it was referred to the Committee on Rules, to wit:

WHEREAS, There is pending before the General Court a bill printed in current House document numbered sixteen hundred and forty-one as Appendix B, entitled "An Act ratifying an interstate compact for establishing uniform standards for conditions of employment, particularly with regard to the minimum wage, in states ratifying the same," said bill constituting an act of ratification on the part of the Commonwealth of the compact formulated and agreed to at a conference of commissions representing certain states of the Union, at which this Commonwealth was represented by the Commission on Interstate Compacts affecting Labor and Industries, duly authorized by chapter forty-four of the Resolves of nineteen hundred and thirty-three, as set forth in greater detail in the Second Report to the General Court of said commission, printed as said House document numbered sixteen hundred and forty-one, a copy whereof is hereto annexed; and

WHEREAS, Before ratifying said compact, the Senate deems it necessary that it be advised as to the constitutional effect of the passage of such pending ratifying bill; accordingly be it

Ordered, That the Senate require the opinions of the Honorable the Justices of the Supreme Judicial Court on the following important question of law:

Would the ratification by the General Court of such compact constitutionally preclude the same or a subsequent General Court from enacting legislation relative to minimum wages for women and minors in industry otherwise than in conformity with sections four and five of Title II of said compact? (See page 12 of said House document numbered sixteen hundred and forty-one.)

An answer to the foregoing question is respectfully sought by the Senate for its guidance at the next annual session of the General Court, to which it is proposed to refer said pending bill.

Commonwealth of Massachusetts.

ADMINISTRATIVE COMMITTEE OF DISTRICT COURTS.

AUGUST 15, 1934.

TO THE JUSTICES, SPECIAL JUSTICES, CLERKS AND PROBATION OFFICERS OF THE DISTRICT COURTS:—

It has been our custom to issue a circular letter on July 1st of each year. The delay this year was due to our desire to study the new laws affecting our District Courts.

THE NEW PARKING LAW.

Chapter 368 of the Acts of the year 1934 taking effect October 1st, provides for the non-criminal disposition of charges for violation of parking rules, etc. Your Committee is required thereunder to establish fines for such violations and to prescribe the form of notice to offenders. Before discussing this Act in detail, it desires to say that the fines have been and are hereby established as follows:

1st offense	$3.
2nd offense	$5.
3rd offense	$10.

There will be found enclosed herewith copies of the form as prescribed by your Committee. These notices will be an original, duplicate and triplicate for the clerk, the operator and the police files in the order named. The responsibility of printing these forms and placing them in the hands of the officers is that of the clerks. They should bear in mind that the notices must necessarily be in a pad form, with carbon sheets, easy to handle, properly backed or enclosed within a folder and convenient in size to fit a coat pocket. The committee understands that there are large areas of the state where no rules, regulations or ordinances are in effect. For such areas there will be no necessity to furnish bound blanks. Where there is a limited enforcement of such rules or regulations it may be found more economical to use typewritten forms but the clerk in each court must work out this problem according to local conditions. Your Committee can, if requested.

furnish to the clerks the name or names of printers who can do this work.

We now proceed to analyze the Act and to comment briefly upon some of its provisions.

It is the duty of a police officer who takes cognizance of a violation of a parking rule, etc., forthwith

> (1) To give to the offender a notice to appear before the Clerk of the District Court having jurisdiction.

Comment. The form of this notice has been referred to above. It must be made in triplicate, contain the name and address of the offender, the number of his license, if any (some jurisdictions do not require a license), the registration number of the vehicle, the time and place of the violation, the specific offense charged and the time and place for appearance. Specifically the time must be during the office hours of the clerk and the date not later than five days after the time of the violation. In the majority of cases it is probable that there will be no offender in the car which is parked in violation of a rule or regulation. Therefore it will not be possible to obtain the number of the license. In the opinion of the Committee, the omission of this information will not vitiate the notice. It is also the opinion of the Committee that while the language of the statute is "not later than five days after the time of said violation" what was intended was "five days after the *date* of the violation".

> (2) When it is not possible to deliver a copy of the notice to the offender at the time and place of the violation, a copy must be sent by the officer within twenty-four hours of the offense, by registered mail, directed to the address of the registrant of the motor vehicle involved as appearing in the records of the Registry of Motor Vehicles.

Comment. This probably means that in the majority of cases the officer will have to consult the records now found in most police departments as to the ownership of the car as disclosed by the registration plates, and if such records are not available he will have to obtain the information from the Registry of Motor Vehicles or a local registry. The provision requiring that the notice be sent within twenty-four hours of the offense seems to be mandatory and failure so to do would excuse the offender from appearance. As to these particular matters the problem seems to be one for police departments rather than for the Courts.

(3) At the completion of each tour of duty, the officer must give to his commanding officer two copies of each notice delivered or mailed, one of which copies is retained by the commanding officer and the other must be delivered to the clerk of the Court before whom the offender has been notified to appear at a time not later than the beginning of the next Court day.

The Clerk of each District Court is required:

(1) To maintain a separate docket of all such notices to appear.

(2) In case any offender fails to appear to notify the registrar.

(3) To again notify the registrar when the resulting criminal case has been disposed of in accordance with law.

(4) To receive and act upon the request of any offender who may appear personally or through a person duly authorized in writing to take the offense charged for confessed.

(5) To determine the previous record of the offender in his own court within the period of one year and therefrom whether the offender has been before said Court within said period for the same offense. If the offender has not appeared in excess of three times within the year to notify him of and to receive from him the established fines.

(6) If the violation is a fourth or subsequent offense within the particular court and the period of one year to notify the offender that the provisions of Chap. 368 are not open to him, and in case a person notified to appear fails so to do and to pay the fine or forfeiture as required, or having appeared desires not to avail himself of the benefits of the procedure established by said Act, or has been before the Court three times within one year for the same offense, to notify the officer concerned and to issue a complaint upon the request of said officer, which complaint shall be followed by the procedure established for criminal cases.

(7) To provide the officers with the prescribed notices and to take a receipt therefor.

In connection with the administration of this law, your attention is called to the case of *Commonwealth* v. *Ober*, 1934 A. S., page 473. This case in substance involved the question whether the rules and regulations of the Boston Traffic Commission, in force at the time the acts complained of, were framed and intended to cover and make punishable any violation of section 31 (5) 19 and 17 (4) by the owner of a registered vehicle, whether the particular violation or violations were by the owner or were by a person allowed, permitted or suffered by the owner of any vehicle registered

in his name, in any street, way, highway, road or parkway under the control of the City of Boston. The opinion holds that the evidence established a *prima facie* case which was not met by evidence offered by the defendant and therefore the owner of the car without proof that she herself had parked the same could be found guilty.

The pertinent provisions of the rules and regulations above referred to are as follows:

> "Sec. 31 (5). No person shall allow, permit or suffer any vehicle registered in his name to stand or park in any street, way, highway, road or parkway under control of the city in violation of any rules and regulations of the Traffic Commission of the City of Boston."
>
> "Sec. 19. Except as otherwise provided, no operator shall park any vehicle between the hours of 7 o'clock A. M. and 6 o'clock P. M. on any day except Sundays and legal holidays on any street for a period of time longer than one hour"; and
>
> "Sec. 17 (4). No operator shall stop, stand or park any vehicle with passenger registration for more than five minutes continuously or any vehicle with commercial registration for more than twenty minutes continuously in any of the following places:"

To what extent local rules, regulations, ordinances or by-laws are of similar tenor, your Committee has no information.

It does question however, and the judges should seriously consider, whether in municipalities where there is no regulation similar to Section 31 (5) of the Boston Regulations the owner of a car is guilty of an offense if the car is parked by someone else. Clerks should be instructed by their judges and told how to proceed in such cases.

THE NEW LAW RESPECTING TORT ACTIONS ARISING OUT OF THE OPERATION OF MOTOR VEHICLES.

Chapter 387 of the Acts of 1934 is an Act giving District Courts exclusive original jurisdiction of actions of tort arising out of the operation of motor vehicles.

Section 1 of said chapter amends section 19 of chapter 218 of the General Laws, which section establishes the civil jurisdiction of District Courts, by adding thereto *inter alia* the words "District Courts shall have exclusive original jurisdiction of actions of tort arising out of the operation of a motor vehicle."

Section 2 of said chapter amends section 2 of chapter 233 which has to do with the venue of actions, by striking it out and inserting an entirely new section in place thereof. As thus amended, section 2 of chapter 223 provides *inter alia* as follows:

> "An action of tort arising out of the operation of a motor vehicle shall be brought in a District Court within whose judicial district one of the parties lives or in any district in the same county which adjoins the judicial district in which the defendant lives or has his usual place of business."

Section 3 amends chapter 231 of the General Laws by inserting a new section numbered 102A. By this amendment it is provided that a party bringing in a District Court an action of tort arising out of the operation of a motor vehicle shall thereby be deemed to have waived a trial by jury and any right of appeal to the Superior Court unless said action is removed to the Superior Court as provided in this section, but in case such action is so removed by any other party, the plaintiff shall have the same right to claim a jury trial as if the action had been originally brought in the Superior Court. Not less than two nor more than four days after the entry of such an action in the District Court the plaintiff may file in said court a claim of trial by the Superior Court with or without jury and an affidavit by his counsel of record, if any, and if none the affidavit of such party that in his opinion there is an issue of fact or law requiring trial in the cause and that such trial is in good faith intended, together with the sum of $3. for the entry of the cause in the Superior Court. The clerk shall forthwith transmit the papers in the cause and such entry fee to the clerk of the Superior Court and the case shall proceed as though originally entered there. No other party to such action shall be entitled to an appeal. In lieu thereof any such other party may remove such action to the Superior Court and the pertinent provisions of sections 104 to 110 inclusive shall apply thereto. If a trial by jury is claimed by any party such action may be marked for trial upon the list of causes advanced for speedy trial by jury.

This Act takes effect October 1, 1934.

Clerks will bear in mind that the right of the plaintiff to remove such actions is limited within the period of not less than two nor more than four days after the entry and an entry fee of $3. only is required. The defendant on the other hand may within

two days after the time allowed for entering his appearance file a claim of trial by the Superior Court and a supporting affidavit, but must deposit not only the sum of $3. as an entry fee but a bond in the penal sum of $100.

Just what results will be reached through this new legislation in the attempted transfer of a portion of the trial load now burdening the Superior Court no one can at present determine. Without the supporting legislation involving entry and jury fees, the result may simply be added work for the clerks of the District Courts. It is the committee's opinion however that a considerable body of this type of litigation will stay in the District Courts provided the attorneys and insurance companies are satisfied that the cases will receive adequate and intelligent consideration and decisions be promptly made.

It is clearly evident that the taxpaying public feel that a considerable part of the litigation now burdening the Superior Court should be tried in the District Courts both from the standpoint of economy and of early decision.

The chapter under consideration somewhat enlarges the venue and gives the parties the opportunity to have these cases considered by one of a larger body of justices. This is in line with the movement to make all the District Courts so-called County Courts. Your Committee feels it highly important that there be wholehearted co-operation in the administration of this particular legislation. We realize that a substantial burden may be added without any compensating increase in salary at the present time. We interpret this legislation as one step in the gradual development of the District Court System and in the right direction.

In considering this chapter, we feel we should call your attention to section 17 of chapter 218 which reads as follows:

> "A Justice, Clerk or Assistant Clerk of a District Court shall not be retained or employed as attorney in an action, complaint or proceeding pending in his court or which has been examined or tried therein, and a Special Justice shall not be so retained or employed in any case in which he acts or has acted as Justice."

While the strict letter of this section may permit a Justice or Clerk to act as attorney in an action in the Superior Court but removed thereto from their own court, it would seem to us both improper and embarrassing for a Justice or a Clerk either directly

or indirectly to remove or cause to be removed such an action from his own court in order that he may act as counsel in the Superior Court. We realize that this may result in a loss of business to some officials but the necessity of maintaining confidence on the part of the public in the officials of our courts must outweigh any individual losses.

A LETTER FROM THE DEPARTMENT OF MENTAL DISEASES.

The following letter has been received by our Committee from the Department of Mental Diseases, and we are glad to comply with the request therein contained:

> "On at least two previous occasions the Administrative Committee of the District Courts, at the request of the Department, have been good enough to call to the attention of the district courts the desirability and advisability of reporting to this Department the names of defendants bound over to the grand jury whose records bring them within the operation of Section 100-A, Chapter 123, of the General Laws (Ter. Ed.). The response to these items, which have appeared in letters to the district courts, has been gratifying but the situation is still far from ideal. In reviewing the data concerning the operation of this law for 1933, it was found that only approximately 15% of the defendants reported to this Department were reported by the clerks of the district courts. In other words, 85% of the work of reporting was thrown upon the clerks of the superior courts with the result that all too frequently this Department is called upon to make a hurried and incomplete examination of the defendant, or an unnecessary delay is caused to the court in bringing the case to trial. Presumably the probation officer of each district court has at hand information as to the previous record of a defendant who is bound over for action by the grand jury. It would certainly seem that the law requires that such information should be at hand before the court admits the defendant to bail. If such information is at hand, there would appear to be no reason why it should not be transmitted to the clerk of the district court and why he should not, in turn, report the case to the Department of Mental Diseases. This procedure, if uniformly followed, would minimize delays, would give the Department an opportunity to make a satisfactory examination, and would be much fairer to the defendant as well as to the courts.
>
> It would be greatly appreciated by this Department if this matter could again be called to the attention of the district courts."

THE PAROLE BOARD AND SENTENCES TO THE STATE FARM.

Your Committee has recently been in conference with the Board of Parole. We received a communication from that Board suggesting that there might be an improvement in the promptness with which it was notified by the Courts of violations of parole. At this conference it was agreed that in the next circular letter attention would be called to this reported laxness and probation officers urged to avail themselves more fully of the information in the office of the Commissioner of Probation, and to promptly report to the Parole Board the appearance of any man before their respective Courts whom the record showed to be on parole. Our Committee suggested to the Board of Parole that men were not ordinarily sent to the State Farm until they had received every consideration and been committed to local Houses of Correction. Especially was this true where the commitments were made by the Courts at some distance from Bridgewater. These commitments having been made after careful consideration, it was felt that more care should be exercised in extending parole. We told the Board we had reliable information tending to show that misrepresentations were often made and that men were paroled under the specious plea that they were needed by their families for support and that their imprisonment threw an additional burden upon the community. It was finally agreed that our Committee ask the probation officers to send to the superintendent of the State Farm with each commitment a memorandum which should be something more than a copy of the record and particularly in all cases where it was felt the State Farm was the proper penal institution within which the defendant should be confined. With this information available, the Parole Board stated it would be able to pass much more intelligently upon the many applications made to them. We earnestly urge your co-operation in the matters above set forth.

SOME GENERAL OBSERVATIONS.

The past year has been one of considerable stress. We have had two investigations, one by the Commission on Public Expenditures and the other by the Commission on Crime. The Administrative Committee, while recognizing the fact that it is no part of its duty to encourage or defeat legislation, has felt there was justification for its appearance before these commissions to explain the District Court System and to analyze proposed changes. With

all due respect, there is great ignorance and misunderstanding of the work and true functions of the district courts. Moreover there is a tendency to legislate to meet isolated situations and with disregard of the fact that the system is state-wide. With some of the criticism we were in agreement. There are defects in procedure and misfits in personnel which we cannot excuse. While doubtless there was some reason for the establishment of each of our seventy-two courts, conditions have changed and will change so that from an economic standpoint and possibly from that of real efficiency a number of these courts might be abolished. We recognize however the local interest and pride of the several communities where they are located. It is possible that if the recommendation as to such had been less sweeping a few of the courts might have been abolished, but to suggest one-fourth of the whole number be done away with was in our judgment impractical and invited defeat of the specific recommendation as well as others. The idea of circuit courts while theoretically sound under proper conditions was in our judgment impracticable and impossible of application throughout the entire state. With the idea that the larger courts should have full-time service we are in accord if the salaries are adjusted to that end. Moreover we believe that all the judges should be barred from criminal practice in any court. We are not unmindful of the fact that no Presiding Justice now appears in any criminal case, that many of the Special Justices do not appear as counsel in such cases in their own courts and a few in no court, and that but few of the clerks practise at all. Yet there have been so many cases of what seems to us impropriety we feel the only way to end what is generally regarded by bench, bar and public as improper is a legislative act forbidding such practice. It certainly does not sound well to read in the press that "Judge . . . ." appeared as counsel for a man accused of serious crime. Moreover we are in entire accord with the idea that once a man has accepted a judicial position he should retire from political life except as to local office. We realize that in some of the smaller courts there might be forced resignations if such a law were enacted, but the good of the whole cannot be sacrificed for a few.

When we come to the suggestion that all of the court officials be barred from practice in their own courts on the civil side, we are not in accord with the legislation which passed the House but was killed by the Senate. We would believe in the principle if the number of Special Justices could be reduced so that those remain-

ing could serve a sufficient number of days to compensate for their loss of income but even then in courts with a population of less than say twenty thousand there would be trouble. Moreover in the districts served by these smaller courts there is no criticism. We have, however, been surprised as we have gone about the state attending gatherings of the bar at the unanimity of opinion expressed generally in these words "We do not want to try a case before a man as a magistrate one day and against him as an attorney the next." This same feeling holds against the few Presiding Justices who actively practise in the Superior Court. There is no doubt but there is a steadily growing conviction that the larger District Courts should be full-time courts with adequate compensation.

We do not deem it necessary to discuss at this time the other recommendations found in the reports of the two commissions. There is however a larger view which we think should receive our attention. While there are some who would like to tear down our judicial structure and re-erect it, the more we study the systems in other countries and in other states within our own country, the more we are convinced we have here in Massachusetts the very best organization for our own needs. The district courts economically and conveniently located are the peoples' courts. They are equipped to handle the great load of judicial work. Given a personnel of intelligence and character there is no reason why they should not dispose of all the work they are now doing and relieve the congestion in the Superior Court. This presumption of intelligence and character fails unless the chief executives of the Commonwealth realize the importance of these official positions and make appointments wholly because of merit rather than for political or other expedient reasons.

The most serious problem confronting us is how to transfer a large part of the present trial load from an undermanned court to the overmanned District Courts. Habit, prejudice, belief on the part of the public and bar in the value of jury trials, lack of confidence in some of the judges of the District Courts, all these and other factors now stand in the way of a voluntary transfer of the load. Of one thing we are sure, namely that making all allowances and eliminating the unfit if any there be, there is a large reservoir of ability and legal capacity in the District Courts now unemployed. We must find some way to utilize this reservoir if we are to relieve the present intolerable congestion in the Superior Court.

Underlying all these problems is the factor of confidence in the District Court judges. We have listened this past year to a large volume of general criticism, we have heard criticism both in public and in private of certain officials. The twelve-year background of this committee has given it such intimate knowledge that most of this criticism is not new or entirely unexpected. In fairness however we must say that the bar at times and especially in days of depression is apt to be unfair in its criticisms. Ignorance, inexperience and petty jealousies often try the patience of the Justices. Failure to secure preference or favors for clients often provokes unjust criticism. If cases are inadequately presented, it is unfair to find fault with the findings. It is easy to over-emphasize and to distort facts. Lack of knowledge of the real situation is often the basis of this unfairness. On the other hand there is no excuse for what has been called the insolence of authority, for failure to give preference at all times to one's official duties, for unwise and disagreeable "talking from the bench", for caustic treatment of the beginner at the bar, for discourteous treatment of parties or witnesses, for disregard of the niceties and proprieties of judicial activities, for unreasonable delay in the decision of civil causes, for undue severity or unwarranted leniency, for failure to co-operate with all governmental agencies, for failure to discharge one's financial obligations with promptness, or generally to recognize that to hold an official position in a District Court is an honor and demands the best and finest service of which we are capable. Perhaps our ideal for the District Court System is too high but we think not.

We hope during the coming months and within the present year to continue our visits to the courts.

PHILIP S. PARKER.
NATHANIEL N. JONES.
CHARLES L. HIBBARD.

A SUGGESTION FOR APPEALS.

By the growth of reported cases, appeals are presenting an increasing problem, and in any revision of our judicial procedure in the Commonwealth this problem must be met. The following suggestions may be of some service.

An appeal is looked at from two points of view, which sometimes harmonize and sometimes do not. The first is the point of view of the litigant, who naturally feels that a ruling made by a single judge ought to be reviewed at greater length for the protection of his rights. His feeling that there may be some error has certainly justification, inasmuch as in the six volumes of Reports, from 278, Mass., to 283, Mass., the number of reversals or modifications, excluding cases reported, runs from 15 to 25 per cent. In other words, there is a chance that his case may be one of six, to one of four, in point of error. Even without that chance, it would be highly desirable, and in fact, necessary, that there should be an opportunity for a review in order to make a litigant contented. Content with any judicial system is a very important matter. It is worth while to have litigants contented, even if many of the points that are raised are hardly worth considering, and occupy a good deal more attention than they deserve.

The other point of view is that of the development of the law. As our law develops from precedent, it is of course necessary that there should be well-considered precedent which will lead to its development. Cases ought to be carefully considered; points of law thoroughly developed; with the result that we may have precedents of a high order.

By the methods we are now adopting, these two points of view often conflict. As every case goes up as a matter of right, and apparently every case has an opinion devoted to it, our books are beginning to be filled with cases which have very little interest for the general development of the law—however interesting they may be to the litigants themselves. This throws a very heavy burden upon the Supreme Judicial Court, without any corresponding benefit to the community, although of course it is of great importance that the litigants should feel that their cases have been thoroughly and systematically considered.

It is necessary in some way to reconcile these two points of view, and we already have a certain trend, in the District Courts,

the Appellate Division, as these constitute an intermediate tribunal which naturally would increase the labor if such appeals went to the Superior Court, and thence to the Supreme Judicial Court. My suggestion is that we carry this a step further and provide for an intermediate tribunal in the Superior Court itself. Such a tribunal might consist of three judges, to which all appeals should come in the first instance. They need not come in any printed form, nor need the brief be anything more than typewritten. On the criminal side, such a tribunal might be practically a court of criminal appeals. This would give an opportunity of review, to which every litigant is really entitled, and which he must have if we are to maintain confidence in our judicial system. The opinions of this intermediate tribunal need not be published and thus there would not be a new series of reports, which would still further complicate the situation.

Probate appeals could be treated in like fashion by an intermediate court of probate appeals, constituted from the probate judges. Appeals from the Land Court might very properly go direct to the Supreme Judicial Court, for they are few in number and there is no way of establishing an intermediate appellate tribunal for them.

It is probable that this method would cut down very considerably the number of cases going to the Supreme Judicial Court, and so lighten the work of that court and permit it to be done more speedily and with greater thoroughness. For this purpose, each of the justices of that court should have a law secretary, and it would be well to adopt the plan of having briefs filed considerably in advance, so that not only counsel for the litigant might have them, but the court itself might consider them before the argument. This is the method adopted by the Supreme Court of the United States, and in some other courts, and would, I think lead to a much more satisfactory oral argument, and to corresponding results. The bar would likewise feel easier if opinions were handed about to the justices in printed shape before being made public—another method in use by the Supreme Court of the United States, and heretofore recommended by the Judicature Commission of Massachusetts.*

If this intermediate tribunal, without more, did not cut down the cases going to the full bench, they could be reduced by having only those cases go in which the intermediate tribunal certifies that there was, in its opinion, a real question for the highest court; or

* 2nd Report, pp. 66-67, MASSACHUSETTS LAW QUARTERLY for January, 1921.

if the tribunal would not do that, then a writ of certiorari might be applied for by one of the parties which desired to go further. That, however, would not be necessary at the outset, until we found how the intermediate tribunal worked without such limitations.

The foregoing of course is merely a suggestion. After all, an intermediate tribunal of this kind is only one part of the whole system of appeals. Other things to be considered, are interchangeability of judges, and in particular, central administrative control of the entire system. On these subjects I will venture to write further at some future time.

GEORGE R. NUTTER.

NOTE.

The problem of intermediate appellate courts and double appeals was discussed by Prof. E. R. Sunderland in the light of experience in other jurisdictions in an address at the National Conference of Judicial Councils at Grand Rapids in August, 1933, which was printed in the *Journal of the American Judicature Society,* for December, 1933, pp. 116–120.

The Third Report of the Michigan Judicial Council, of which Prof. Sunderland is secretary, contains a study of appellate procedure in all American jurisdictions.

A "POINT OF ORDER" ON THE "CHILD CONTROL" AMENDMENT.

(Reprinted from the American Bar Association Journal for July, 1934.)

In the recent discussions before state legislatures relating to the child labor or "Child Control" Amendment, as far as I have seen them in print, the question has been raised whether "the reasonable time" within which an amendment can be ratified has passed since it was first submitted by congress in 1924. This question has been raised under the opinion in *Dillon* v. *Gloss.* The entirely different aspect of the legal question suggested by a still more recent opinion has not, apparently, been noticed outside of Massachusetts. It seems to me to deserve the attention of the entire American bar and of every state legislature.

In the very recent unanimous opinion by Chief Justice Hughes in *U. S.* v. *Chambers and Gibson,* decided February 5, 1934, the court took "judicial notice of the fact that the ratifica-

tion of the twenty-first amendment which repealed the eighteenth amendment was consummated on December 5, 1933," and they cited the case of *Dillon* v. *Gloss*, 255 U. S. 368. December 5th was the date on which the 36th state voted to ratify.

Since the constitution requires a vote of three-fourths of the several states to ratify an amendment, it requires only one state more than one-fourth to defeat ratification and it seems to follow as a matter of commonsense and orderly procedure from the decision just referred to that the rule must work both ways and that when 13 states (1 more than ¼ of the 48 states) have voted not to ratify an amendment it is no longer pending, but is defeated until congress sees fit to resubmit it. Otherwise, a state could change its mind in one direction after a final vote of the necessary number of states, but not in the other direction.

In the case of the Child Control Amendment, not only 13 but 26 states voted not to ratify. I submit that it was clearly defeated. If this is not so, states might be subjected to constant agitations over defeated amendments after the citizens considered them defeated and were off their guard.

When an amendment is submitted by congress, the process of ratification is really a debate among the several states. If it is true, as I believe it to be, that at this time the Child Control Amendment is no longer before the states, the action of those states which have attempted to ratify it during 1933 has no legal effect.

Massachusetts took the lead in defeating the amendment when it was submitted in 1924, not only by vote of the legislature, but also by an impressive advisory vote of the people after a vigorous public discussion which showed a popular vote of 247,221 in favor of and 696,119 against ratification. Thereafter, the proposed amendment was voted upon by legislatures of other states with the result, as I understand it, that 26 states rejected it by vote of both houses. If we are to have deliberative government in this country on such important matters as amendments to the Constitution of the United States, is it not essential that we should maintain the rules of orderly procedure similar to those in our legislatures under which after a matter has been definitely defeated by the requisite majority it can not be considered again unless it is resubmitted in the usual way,—in this case by congress.

This preliminary question of law should be thoroughly con-

sidered by the legislature of every state in the Union before it acts on such a matter for it is the duty of every member of a legislature to consider such preliminary questions and not merely "pass the buck" to a court. This is a question of constitutional law which can be thought out by any layman familiar with legislative procedure as well as by lawyers and judges. In other words, there is a point of order which should be raised in every state legislature before this federal amendment is further considered. It was raised before the Committee on Constitutional Law of the Massachusetts Legislature this year when there was an unsuccessful attempt to revive consideration of the subject.

FRANK W. GRINNELL.

THE "INVOCATION OF A REMEDY TO PROTECT THE COURTS AND THE PUBLIC"—AN ACCURATE DESCRIPTION OF THE NATURE OF A DISBARMENT PROCEEDING.

(From the Opinion of Chief Justice Rugg in the Matter of Keenan, 1934 Advance Sheets, p. 1703 decided September 13, 1934.)

"Disbarment is not an adversary proceeding in the strict sense. There is no party plaintiff with a private interest. *Boston Bar Association* v. *Casey*, 211 Mass. 187. A disbarment proceeding is an inquest or an inquiry into the conduct of the attorney. It is the pursuit of a right as well as the performance of a duty by or in behalf of the court to purge its officers of an unworthy member. It involves no private interest except that of the attorney. *It is the invocation of a remedy to protect the courts and the public* from the impositions arising from the presence of an unfit person among trusted officers. It does not afford redress for a private grievance. It is an action undertaken and carried forward solely for the public welfare."

A COMPREHENSIVE HANDBOOK ON UNAUTHORIZED PRACTICE.

"Unauthorized Practice of Law", a handbook for lawyers and laymen, by Professor Frederick C. Hicks of the Yale Law School and Mr. Elliott R. Katz, Research Assistant at the same institution, has just been published by The Lord Baltimore Press for the American Bar Association. It can be obtained by sending

$1.00 to the office of the Association at 1140 North Dearborn Street, Chicago, Illinois. The work was undertaken by Professor Hicks at the request of the Association's Committee on Unauthorized Practice, and constitutes the most authoritative study on this subject which has yet been made.

Part one of the book contains the pertinent state statutes, given in full detail. Part two is a digest of cases, summarizing in a short paragraph or two the opinion in every decided case on this subject. Part three sets out the declarations of principles which have been entered into by fiduciaries, generally as a result of negotiations with bar associations or bar association committees, strictly limiting and defining what will be regarded as ethical for their members to do in the field of preparing wills, trust agreements, escrow agreements, conveyances, and so forth. Part four is a bibliography of the general subject.

"MAUDLIN SENTIMENT FOR THE DISBARRED"—THE REFLECTIONS OF A CALIFORNIA LAWYER.

(By James L. Plummer of the Los Angeles bar in the California State Bar Journal for June, 1934.)

"Recently a group of public officials engaged in a campaign against the pampering of criminals by means of maudlin sentiment. When the oratory was completed several of the crusaders took out their fountain pens and signed petitions to The State Bar of California in behalf of two unfortunate ex-members seeking reinstatement from previous disbarment. These pathetic gentlemen had been treated harshly by fate in that they had been caught red-handed in the commission of infamous crimes and for such duly tried and convicted. The gist of the petitions was the usual repentance and desire to follow the boresome straight and narrow path, utterances that seemed amusing in view of the treacherous nature of their offenses as evidenced in each of the trials. . . .

"The actual appeal in both cases was drawn solely by inference that the malefactors were popular in political and social circles. . . .

"It has been quite a while since the American Bar Association inserted into its Canons of Ethics that the right to practice law was a privileged one depending upon character and integrity as well as learning."

AN OPPORTUNITY LOST.

(A Discussion of the Cases of Continental Corporation v. Gowdy, 283 Mass. 204 and Continental Corporation v. The First National Bank of Westfield, 1934 Advance Sheets, 359.)

"It is to be remembered that the main purpose of civil litigation is to do justice between the parties."[1]

In May, 1929, the Martin Trailer Company, a Massachusetts corporation authorized the issue of bonds in the face value of one hundred thousand dollars.[2] Each bond was entitled on the face thereof as "First Mortgage 7% Sinking Fund Gold Coupon Bond." It was further recited in each bond that it is "one of a series of coupon bonds on the Martin Trailer Company, known as its First Mortgage 7% Sinking Fund Gold Coupon Bonds . . . all of which bonds are issued or to be issued under and secured by a mortgage or deed of trust dated April 17, A. D. 1929, and executed by the Martin Trailer Company to the First National Bank of Westfield, in trust, to secure the payment of the principal and interest of all said bonds, to which mortgage or deed of trust reference is hereby made for a description of the property so deeded or mortgaged, the nature and extent of the security, the rights of the holders of the bonds under the same, and the terms and conditions upon which said bonds are issued and secured."

Each bond also contained the following provision: "These bonds are issued without recourse against the stockholders, officers, or directors, under or by reason of any covenants or agreements, expressed or implied, in this bond or in the coupons hereof, or in said trust deed or mortgage." The clause is hereinafter referred to as the "no recourse" clause.

The only certificate or statement on the bonds bearing the signature of the trustee, The First National Bank of Westfield, was as follows: "This is to certify that this bond is one of the bonds described in a mortgage or deed of trust to the subscriber as trustee, and dated April 17, A. D. 1929. The First National Bank of Westfield, Trustee."

The bonds were in denomination of $1,000 each, were dated

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[1] Rugg, C. J., in *Town of Hopkinton* v. *Sturtevant Company*, ... Mass. ...., 1934 Adv. Sh. 309, 311.

[2] For the facts set forth in this article see the opinions in two recent cases: (a) *Continental Corporation* v. *Gowdy*, 1933, 283 Mass. 204; s. c. 1933 Adv. Sh. 1113; (b) *The Continental Corporation* v. *The First National Bank of Westfield*, 1934, ... Mass. ...., 1934 Adv. Sh. 359.

May 1, 1929, due May 1, 1939, and bore interest at the rate of seven per cent per annum, payable semi-annually, November 1, and May 1, of each year. Interest was paid November 1, 1929, and May 1, 1930. In July, 1930, the Martin Trailer Company was put in receivership, and on September 26, 1930, it was adjudged a bankrupt.

It was then discovered that no real estate or interest therein ever had been mortgaged as security for these bonds, but that the sole security therefor was certain machinery and tools *valued by the Martin Trailer Company at the time of the authorization of the $100,000 bond issue, as the trustee knew, at $12,568.01.*[3] At the time of the bankruptcy this security was worth $5,000.00.

The bondholders sought relief in two directions. Against the directors of the Martin Trailer Company, a bill in equity was brought seeking to hold the directors personally liable on the bond indebtedness, under G. L. (Ter. Ed.) c. 156, s. 38, on the ground that stock had been illegally issued by the corporation, and that the directors in 1930 made statements or reports required to be filed by the officers which were false and known by the defendant directors to be false.[4] A demurrer by the defendants was sustained on the ground that by the "no recourse" clause above referred to, the bondholders had agreed in advance not to hold the directors liable for any statutory liability for the contracts of the corporation which they might otherwise be under, and that such agreement was not void as against public policy.

The other direction in which the bondholders sought relief was against the trustee under the indenture of trust, by way of actions of law in the nature of deceit alleging among other things that the trustee by its certifications on the bonds represented that the bonds were secured by a first mortgage on real estate sufficient in value to cover the indebtedness of the entire issue.

The auditor whose findings of fact were final, except such inferences as were drawn by him from facts found, reported that a custom as a fact exists among brokers and bankers in Westfield and vicinity, and in New York City, that the words "first mortgage" appearing on a bond similar to the bonds here certified to

[3] *The Continental Corporation* v. *The First National Bank of Westfield,* 1934 Adv. Sh. 359, 363.

[4] G. L. c. 156, s. 36: "The president, treasurer and directors of every corporation shall be jointly and severally liable for all the debts and contracts of the corporation contracted or entered into while they are officers thereof if any stock is issued in violation of section fifteen or sixteen or if any statement or report required by this chapter is made by them which is false in any material representation and which they know, or on reasonable examination could have known to be false. . . ." See, however, amendment by acts of 1931, c. 313.

by the defendant bank as trustee have a universal meaning or connotation to the effect that the bonds are secured by a first mortgage on real estate which has a value at the time the bonds are issued equal to or in excess of the face amount of the authorized issue of bonds. The auditor further found, however, that there is no evidence that the trustee's certificate, in and of itself, is made by custom or usage a representation that bonds certified were first mortgage bonds, with the property underlying them being at least equivalent to the face amount of the issue. There is a further finding that the bank was not guilty of bad faith.

On the auditor's report the Superior Court denied the plaintiff's motion for judgment, and allowed the defendant's motion for judgment. The Supreme Judicial Court overruled the plaintiff's exceptions.[5]

The above statement does not set forth a full statement of all the facts found in the two cases referred to, but does, the writer believes, contain a fair synopsis of the important facts.

What then is the picture presented by these two cases? Bonds in the amount of $100,000.00 are authorized in May, 1929. At least $80,000.00 in amount are actually issued.[6] Though the bonds are called "First Mortgage Gold Bonds," the only security is machinery valued at the time the bonds are authorized at $12,568.01. In less than fifteen months after the bonds are issued, the issuing corporation is in the hands of a receiver, and the holders of the bonds lose over 95 cents on every dollar they are owed.

And the courts of Massachusetts say that neither the statutory laws of the Commonwealth nor the equitable arm of the law give the deluded bondholders any remedy, so far as concern the directors of the corporation or the national bank which lent its name as trustee.

Is this right?

Take first the action against the directors. The bill in equity set forth that stock of the defendant corporation was issued in violation of G. L. c. 156, sects. 15 and 16, and that the individual defendants in the year 1930 made statements or reports required to be filed by G. L. c. 156, sect. 36, which were false and known to these defendants to be false. The defendants demurred, and thereby admitted the truth of the allegations. Under G. L. c. 156, sect. 36

[5] *The Continental Corporation* v. *The First National Bank of Westfield*, 1934 Adv. Sh. 359.

[6] The net amount realized from the securities for the bondholders was $3,395.32, which entitled the bondholders to a distribution of 4.17 per cent of the face amount of the bonds held.

(cited, *supra,* in note 4) the directors thereby became jointly and severally liable for all the debts and contracts of the corporation contracted or entered into while they are officers thereof. Of course the bonds in question were such debts or contracts.

Nevertheless because of the "no recourse" clause, above referred to and which was contained in each bond, the Supreme Judicial Court held that the directors had contracted themselves out of their statutory liability. The Court in deciding that the "no recourse" clause was not invalid as against public policy pointed out that no fraud on the part of the directors was alleged, and said that no purpose to protect creditors of corporations against the consequence of their own agreements, not induced by fraud, is disclosed by the statute in question.

The Court distinguished the case from *Desseau* v. *Holmes,* (1905) 187 Mass. 486, wherein it had been held that a contract made in advance by a purchaser under a contract of conditional sale to waive his right to a demand in writing and an itemized account and his rights in regard to redemption and sale given by R. L. c. 198, sect. 13 (now G. L. (Ter. Ed.) c. 255, sect. 13) is void as against public policy. The Court said that R. L. c. 198, sect. 13, was enacted for the benefit of improvident persons in straits to obtain money, and for the public at large, while the statute in question was passed for the benefit of investors, a private group, not supposed to be improvident, and not in financial straits.

The Court was not bound by its precedents in making this decision. The opinion recognized that the precise question here involved had not previously been decided in this jurisdiction.[7] Did it not overlook the fact that in the last decade tens of thousands of persons had entered the investing group who had no particular experience in the purchase of securities, who in their attempt to invest their savings were (as the results show) improvident in the extreme, and whose subsequent hardships have proved of enormous detriment to the public? "While the number of stockholders had mounted to 1932 by leaps and bounds, control was increasingly held by a minority, sometimes by management which owned no appreciable amount of stock. The economic security of millions of men and women today is at the mercy of corporate organization."[8]

Failing in their attempt to hold the directors under the statute,

[7] 1933 Adv. Sh., p. 1131; 283 Mass. 204, 224.

[8] Mason's "Brandeis: Lawyer and Judge in the Modern State." Princeton University Press, 1933, p. 43.

the bondholders sought, as above set forth, to impose liability on the bank acting as trustee for alleged misrepresentation.

What is the situation here? The bank certified that each bond was one of the bonds described in a mortgage or deed of trust to the bank as trustee. The bank knew that the bonds were described as "first mortgage" bonds. The bank must be held to the knowledge of the fact found by the auditor, that the term "first mortgage" meant to the investing public that the bonds were secured by a first mortgage of real estate of at least equivalent value to the face amount of the bond issue. The bank knew that a one hundred thousand dollar bond issue was authorized and over eighty thousand dollars face value actually issued. And yet in the face of this knowledge the bank allowed its name to appear on the bond as trustee *for the bondholders*[9] without a word of warning that the bonds were not secured by real estate at all, and that their sole security was machinery and equipment valued *by the borrower* at only $12,568.01.

Here again the Supreme Judicial Court was not bound by precedent. It cites many cases in the course of its opinion in the action in deceit but not one from Massachusetts. It was in a position to establish the law so far as Massachusetts was concerned, that a banking corporation which lends its name and reputation to further the issue of negotiable bonds among the investing public regardless of what it says or does not say on each bond, impliedly represents that so far at least as the security entrusted to it is concerned, the bond issue is what it purports to be in relation to the type of security and its then market value.

In making such a rule, unhampered by the rule of *stare decisis*,[10] the Court would have applied to the business brought before them those legal principles which reflect the fundamental ethical rules of right and wrong, which as the Court has well said are "only a concrete expression of the broader generalization that law is the manifestation of the conscience of the Commonwealth."

JAMES M. ROSENTHAL.

EDITORIAL NOTE.

One lawyer to whom the foregoing article was submitted for comment said:

> "I am old-fashioned enough to think that the principle of *caveat emptor* is still sound. I think that there is a

[9] See *First National Fire Insurance Company* v. *Salisbury*, 1881, 130 Mass. 303, 310.
[10] See *Mabardy* v. *McHugh*, 1909, 202 Mass. 148.

tendency now towards the proposition that wherever there is a misfortune you must find a victim; that everybody becomes a sort of insurer that whatever he does will not result in a loss to anybody. Unfortunately there are accidents in this world, and always will be, for which nobody can be said to be responsible. Mr. Rosenthal's article seems to proceed on the theory that a fool is to be protected. No amount of legislation or judicial decisions can ever make the foolish wise or curtail the gambling instinct or spirit of adventure."

We have not studied the records and opinions to test Mr. Rosenthal's conclusions but the facts, as stated by him, if supported by the record in the cases, seem to raise a question which reaches beyond the principle of *caveat emptor*. We believe the new federal legislation about securities and trading in securities covers such situations. F. W. G.

"THE AMAZING KAMINSKI CASE."

(Editorial from the Springfield Union, September 18, 1934.)

"There seems to be only one of two possible explanations of the second escape of Alexander Kaminski, convicted murderer, from the Hampden County Jail, where for six months he has been awaiting imposition of the death sentence, strangely delayed by Judge Nelson P. Brown, who presided at his trial last spring. All the circumstances seem to indicate that it was either an 'inside job,' with collusion on the part of some person or persons within the jail or else there was gross carelessness on the part of Kaminski's guards.

"The case is extraordinary. The murder for which this Kaminski was convicted was the brutal slaying of Merritt W. Hayden, a Hampden County Jail guard, in connection with his first escape from this jail in October, 1933. While his trial was in progress his brother, John Kaminski, appeared in the Superior Court room armed with bombs and other weapons, with the evident purpose of trying to free him, but was seized and overpowered by Sheriff David J. Manning, who was shot in the leg in the encounter. For that mad act John Kaminski was sentenced to State Prison for from 23½ to 25 years.

"Knowing Alexander Kaminski's desperate character, Sheriff Manning took elaborate precautions to prevent another escape pending imposition of the death sentence and his removal to State Prison, including the employment of three members of the reserve force of the Springfield Police Department to sit in constant guard in front of Kaminski's cell.

"During these precautions Kaminski managed to saw through two of the lower bars of his cell door, pass through the cell corridor and through a steel door leading into the jail kitchen and bakery, where he held a guard and two prisoners at bay while he sawed his way through another barred door leading to the jail yard.

Climbing a fifteen-foot drainpipe on the side of the jail garage, he stepped catlike over the slippery slate roof and dropped to freedom outside the jail walls.

"It was an amazing escape, comparable only to that of the notorious Hoffman from the same institution about thirty years ago, which was also believed to have been an 'inside job.'

"The investigation now in progress may, perhaps, disclose whether or not there was inside collusion in this case. Aside from that, however, there seems to be good grounds for criticism of the delay in sentencing Kaminski. He was convicted on the murder charge March 9, a little more than half a year ago. Since then the county has been at an expense of $100 a week in maintaining a guard over him.

"There seems to have been no good reason for this delay. A reasonably prompt imposition of the death sentence, which the jury's verdict called for, would have permitted the transfer of Kaminski to the safer precincts of the State Prison at Charlestown, where possibly before now he would have paid the penalty of his crime."

A REVERBERATION OF THE KAMINSKI CASE.

(From the Springfield Union.)

To the Editor of The Union:

Sir: The bill for $4000 submitted for payment by the New Sheridan Hotel in Connecticut for the housing of police officers in the recent search for the escaped Kaminski, certainly shows the extravagance with which the taxpayers' money is being spent, without anything to show in the end for it all.

The taxpayers of this county should not have to settle for beverages drunk while these officers were housed in this hotel.

The whole situation has seemed to be a farce from the start, when this criminal was lodged in our county jail awaiting sentence, and guards paid at the average of $100 a week for more than six months, and then with all this precaution the man breaks loose; more of the taxpayers' money wasted by our officials whom we have trusted in handling our money.

The proprietor of the hotel in Connecticut no doubt has a rightful claim for her services and she should be paid, regardless if it is again a waste of the taxpayers' money. As she herself stated they could have used the State Armories for the purpose as well.

INTERESTED TAXPAYER.

Springfield, October 12, 1934.

EDITORIAL NOTE.

Hindsight is better than foresight, and we assume that there was some apparently sufficient reason for delaying sentence, but the consequences of the delay, not only in the form of the escape and the public expense, but in the form of public criticism and

misunderstanding of the courts are most unfortunate. Those who follow the newspapers, and the current legal literature whether in the form of books, or periodicals or other discussions know that the administration of justice is being put more and more on the defensive on both sides of the Atlantic. F. W. G.

"THIS FREEDOM."

(From the Springfield Union of October 6, 1934.)

"There are echoes of the Maged case in the imprisonment of Fred Perkins of West York, Pa., for a code violation. Perkins employed ten men in a battery-building plant at 25 cents an hour, which he raised to 35 cents, or five cents an hour less than the code requirement. Mr. Perkins would have been glad to pay more, but he proved by records that to do so meant going out of business and throwing ten workmen on relief.

"The employes were entirely satisfied to work for what Mr. Perkins was able to pay them, since they knew all the circumstances of his business, his earnings and what he could afford. They knew that they would receive more when business picked up and the profits warranted, and preferred to work for five cents less than the code requirement rather than lose their jobs altogether. When Mr. Perkins was hauled before the Department of Justice investigators, the employes pleaded his case, substantiated the contention that the business could not make a profit at a higher wage and asked permission to work for their present pay.

"But Mr. Perkins was thrown into jail when he declined to pay more and remained there eighteen days until someone provided $5,000 bond. Mr. Perkins thinks he has been deprived of his liberty under the circumstances. The vast majority of right-minded people will agree with him. He had no part as a citizen in making the law under which he was jailed as a common criminal. An executive order by the President made a law which deprived a conscientious, hard-working employer of an honest living. It proved to be as inflexible as the law of the Medes and the Persians and struck back to about that period of civilization.

"It would be hard to convince the average American citizen brought up under the Constitution, that Mr. Perkins has broken a law. If he is made to pay the full penalty they will still believe that he is innocent of any wrong. No American who has the semblance of an idea as to what liberty means will think less of Mr. Perkins, but will rather admire him for the confidence which he has inspired in his employes. Yet, he was thrown into jail under an arbitrary act of official tyranny, and he would be there yet had not someone posted his bond."

THE BOSTON HERALD, FRIDAY, DECEMBER 8, 1933

JUST A WORD OF CAUTION

(Reproduced by permission of the Chicago Tribune.)

A REMINDER OF THE REPORT OF THE WARREN COMMISSION ON THE LIQUOR LAW.

Recent and current comments in the press on the increase of "drunken driving", excessive and ostentatious drinking by women in public places, and various other intemperate activities, give emphasis to the cartoon reproduced above. The following words of a recent writer in the *Boston Herald* are pertinent:

> "It was interesting to note . . . that Old Man Prohibition is raising his head again. That was inevitable from the moment at which the 18th amendment made its exit. It

could also have been predicted that the new drys would be recruited from among the disillusioned wets. . . . One year is too short a time for the appraisal of this particular New Deal which began last December and which is now barely getting a start."

The press reported recently that Congressman Shepherd and others had proposed a new constitutional amendment, not in the prohibitory form of the eighteenth amendment, but in the form of a restoration to congress of unlimited power to regulate liquor. Those who think that the public sentiment which resulted in the repeal of the eighteenth amendment is necessarily a stable sentiment, either in the nation or the states, will do well to read the history of "Three Hundred Years of Liquor Legislation in Massachusetts," by Wendell D. Howie, in the supplement to the Report of the Warren Commission,* which we reprinted in the QUARTERLY for May, 1933.

That story shows the constant shifting back and forth of public sentiment during a period of 300 years. Massachusetts has tried many experiments other than some of those suggested by the Warren Commission. If the liquor interests, the drinkers and the car-drivers become a public nuisance again in the minds of a sufficiently large number of citizens, we may be thrown back on a further study of that commission's report and of the experiments in New Hampshire, Oregon and elsewhere. F. W. G.

THE LATE JOHN L. THORNDIKE'S NOTES ON STATUTES RELATING TO PROBATE COURTS AND OTHER MATTERS.

While going to press we received an inquiry from a judge of probate in regard to the explanatory notes of the late John L. Thorndike to the sections of the act of 1919 relative to probate appeals which was drawn by him. This inquiry suggests that the bench and bar may like to be reminded that his notes to each section of this statute as submitted to the legislature were printed for the convenience of the bar in the MASSACHUSETTS LAW QUARTERLY for May, 1919, pp. 240–249. In the latter part of this period whenever he drew a statute he also submitted to the committee of the legislature explanatory notes to each section. All such notes on statutes drawn by him were turned over to us after his death and many of them were printed in the QUARTERLY. A list of the statutes drawn by him between 1874 and 1920 will be found in the QUARTERLY for May, 1922, on page 71, and references to the notes on page 73. F. W. G.

* The report of the Commission containing its recommendations and the reasons for them was reprinted in the MASSACHUSETTS LAW QUARTERLY for March, 1933, for convenient reference in future.

CLAIMS AGAINST ESTATES.

A difference of opinion has arisen as to the construction of section 1, of chapter 417, of the Acts of 1931 amending General Laws, chapter 197, section 9, relating to limitation of actions by creditors of an estate of a deceased person.

Prior to the passage of this amendment the Judicial Council when recommending the original draft had pointed out in its sixth report (p. 21) that under the then state of the law a creditor might commence a suit within the year by drawing a writ, but might delay the actual service of the writ for a considerable period of time after the expiration of the year. Under these circumstances an executor or administrator distributing the assets in his hands in good faith at the end of the year might be held personally liable to the plaintiff in the action which was pending without the executor's knowledge. The amendment in question was passed to afford protection against this possibility.

General Laws, chapter 197, section 9, as amended provided in substance that the executor should not be held to answer to any action commenced, but not entered, within the year, unless either he had actually been served, or accepted service within the year, or "a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought, has been filed in the proper registry of probate."

It has been contended that the provision for the filing of notice in the registry of probate was the equivalent of, or a substitute for, service in ordinary course, and that the executor should be defaulted in the event that he did not file an answer after the return day, whether he had been served with regular judicial process or not. I understand that there have been rulings in some district courts to this effect.

This construction seems erroneous. The statute does not state that the sending of notice to the registry of probate is to be deemed a service of the writ. In that respect it is entirely different from the law authorizing service on foreign corporations by serving the Commissioner of Corporations. This law does not make the Register the agent of the executor for the purpose of service. It is merely a preliminary condition of service in regular course made after the year had expired. That was the obvious purpose of the recommendation of the Judicial Council as shown by their report.

The law does not require the Register of Probate to notify the executor of the filing of this notice. Surely that would have been provided for if it had been intended that the mailing of this notice was to be deemed to be service of the writ.

In conclusion it may be noted that the law may not completely meet the situation which the Judicial Council had in mind. Where a suit is returnable within the year, it would seem that there would be no necessity of actually serving the executor within the year. The suit could be entered within the year and the executor served long thereafter by supplementary process.

DAVID BURSTEIN.